80-1027

NO. _____

Supreme Court, U.S.
FILED
DEC 18 1980
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

BAILEY MARSHALL, DIRECTOR OF THE UNIVERSITY INTERSCHOLASTIC LEAGUE, AND MEMBER OF THE EXECUTIVE COMMITTEE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, ET AL.,

Petitioners

V.

JANE DOE, ON BEHALF OF JOHN DOE, A MINOR,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant

RICHARD E. GRAY, III
Executive Assistant

PAUL R. GAVIA
Chief, State & County Affairs

LAURA S. MARTIN
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3131

Attorneys for Petitioners

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

BAILEY MARSHALL, DIRECTOR OF THE UNIVERSITY INTERSCHOLASTIC LEAGUE, AND MEMBER OF THE EXECUTIVE COMMITTEE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, ET AL.,

Petitioners

V.

JANE DOE, ON BEHALF OF JOHN DOE, A MINOR,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Bailey Marshall, Director of the University Interscholastic League, and member of the Executive Committee, individually, and in his official capacity, et al., respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on July 21, 1980, with Petitioners' Timely Motion for Rehearing denied on September 24, 1980.

QUESTION PRESENTED FOR REVIEW

The principle question presented for review is:

Whether the Court of Appeals correctly held that Jane Doe, as Plaintiff, was a "prevailing party" for purposes of attorney's fees under 42 U.S.C. §1988 when it wholly failed and refused to render a decision on any of the substantive issues at bar.

PARTIES TO THE PROCEEDING

In the District Court below, Jane Doe, on behalf of her minor son, John Doe, as Plaintiff, brought suit against:

> Bailey Marshall, Director of the University Interscholastic League, and member of the executive committee, individually and in his official capacity;
>
> William Farney, State Athletic Director of the University Interscholastic League, and member of the Executive Committee, individually and in his official capacity;
>
> Thomas M. Hatfield, Chairperson of the University Interscholastic League Legislative Council and member of the Executive Committee, individually and in his official capacity;
>
> Other members of the University Interscholastic League Executive Committee: Lynn F. Anderson, Lynn W. McCraw, Betty Thompson, Clifton Van Dyke, Jesse J. Villareal, and June S. Williams, each individually and in his official capacity;
>
> Dr. Emmett McKenzie, Jr., Superintendent of Alvin Independent School District, in his official capacity.

All of the individuals serve in the capacities described except Clifton Van Dyke and June S. Williams, who no longer serve as members of the University Interscholastic League Executive Committee. However, Bailey Marshall as Director of the University Interscholastic League is the real party in interest and no defect as to parties is alleged by Petitioners.

INDEX

	Page
QUESTION PRESENTED FOR REVIEW	2
PARTIES TO THE PROCEEDINGS	3
INDEX OF AUTHORITIES	5
OPINIONS BELOW	6
JURISDICTION	6
STATUTE INVOLVED	6
STATEMENT OF THE CASE	9
REASONS FOR GRANTING THE WRIT	11
CONCLUSION	17
CERTIFICATE OF SERVICE	18
APPENDICES	A-1

INDEX OF AUTHORITIES

Cases **Page**

Board of Regents of the University of Texas v. New Left Education Project, 414 U.S. 807 (1974) 15,17

Diffenderfer v. Central Baptist Church, 404 U.S. 412 (1972) 15

Duke Power Company v. Greenwood County, 299 U.S. 259 (1936) 15

Grubbs v. Butz, 548 F.2d 973 (D.C. Cir. 1976) 13

Hall v. Beals, 396 U.S. 45 (1969) 15

Hanrahan v. Hampton, 48 U.S.L.W. 3780 (June 2, 1980) . 12,13

Hildebrand v. Board of Trustees of Michigan State University, 607 F.2d 705 (6th Cir. 1979) 13

Howard v. Phelps, 443 F.Supp. 374 (E.D. La 1978) 10

Iranian Students Association v. Edwards, 604 F.2d 352 (5th Cir. 1979) 16

Johnson v. State of Mississippi, 606 F.2d 635 (5th Cir. 1979) 16

Lebus v. Seafarer's International Union, 398 F.2d 281 (5th Cir. 1968) 15

Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978) 13

Smith v. University of North Carolina, ___ F.2d ___, (4th Cir., Sept. 30, 1980) 10,12

Troy State University v. Dickey, 402 F.2d 515 (5th Cir. 1968) 15

United States v. Munsingwear, 304 U.S. 36 (1950) 15

University of Texas Systems v. Assaf, 435 U.S. 992 (1978) 15,17

OPINIONS BELOW

The opinion of the Court of Appeals, for which review is sought, is reported at ____ F.2d ____. A copy of the opinion is also included in the Appendix to this Petition. The District Court opinion (entered as "Reasons for Granting Preliminary Injunction") is not reported but is included in the Appendix together with the District Court's judgment (entered as "Injunction"). The judgment of the Fifth Circuit and its order denying rehearing is also set out in the Appendix. The denial of rehearing is reported at ____ F.2d ____.

JURISDICTION

The opinion of the Court of Appeals was entered on July 21, 1980. Petitioners' Petition for Rehearing, which was timely filed, was overruled by the Court of Appeals on September 24, 1980. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The statutes in question in this case are Section 504 of the Rehabilitation Act of 1973, codified as 29 U.S.C. §794; 42 U.S.C.A. §1988; and Art. VIII, Secs. 13 and 14 of the Constitution of the University Interscholastic League (UIL) for 1978-1979.

Section 504 of the Rehabilitation Act of 1973, originally provided:

> "NO otherwise qualified handicapped individual in the United States, as defined in section 7(6) (29 U.S.C. §706[6]), shall solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

Section 504 was amended in 1978 to provide for nondiscrimination by federal agencies, and after amendment now reads:

> "No otherwise qualified handicapped individual in the United States, as defined in section 7(7) (29 U.S.C. §706[7]), shall solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees."

The Attorneys' Fees Act, 42 U.S.C.A. §1988, provides:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law,

> as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provisions of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

Article VIII, Section 13 of the Constitution of the University Interscholastic League (UIL) for 1978-1979 provides as follows:

> Sec. 13. *Changing Schools* -- A pupil changing schools is not eligible in League contests, until he has been in attendance at the school to which he changes for one year if: a) his parents reside outside the school district; or 2) his parents reside outside the school attendance zone in school districts with more than one high school.

Article VIII, Section 14 of said Constitution provides in relevant part (with inapplicable exceptions omitted) as follows:

> Sec. 14. *One Year Rule* -- A pupil who has represented a high school (other than his

present school) in either football or basketball is ineligible, only in the sport or sports (football or basketball) in which he participated, for one calendar year in a school to which he changes.

STATEMENT OF THE CASE

Jane Doe, mother of an emotionally handicapped minor, sued for injunctive relief to allow her son to play interscholastic high school football at the high school to which he had transferred for alleged medical reasons. Under the interscholastic league's transfer regulations, Jane Doe's minor son would have been allowed to play football at the high school he had previously attended; he, however, was not eligible under the rules to play football at the high school to which he had immediately transferred until he had resided in the new school district for one year.

Jane Doe did not seek to invalidate the UIL "no transfer" rule or to test its constitutionality. She merely alleged that the District Court had jurisdiction to grant her a private cause of action to show that the effect of the UIL rule violated Section 504 of the federal law.

The District Court held that Jane Doe's minor son was a "handicapped" individual within the provisions of Section 504 and that Section 504 provided a private right of action to her. The District Court entered a preliminary injunction to allow the minor to play high school football during his senior year at the high school of his choice.

After the UIL appealed, the Court of Appeals dismissed the case as moot because John Doe had graduated from high school. The Court of Appeals refused to determine the issues raised by the suit and further held that, because she had obtained injunctive relief in the lower court, Jane Doe was a prevailing party for purposes of 42 U.S.C. §1988 and entitled to

attorney's fees. The Court later denied Appellants' Motion for Rehearing En Banc.

At the hearing in the District Court, the UIL denied that they were recipients of federal financial assistance for regulatory purposes under Section 504 and that Jane Doe had not made a showing that they were. Furthermore, no showing was made by Jane Doe that her minor son, through the UIL's treatment of his "case," was subject to treatment any different from that of other individuals falling under the provisions of the UIL's "no transfer" rule.

The Court below entered its opinion in this case on July 21, 1980, unanimously holding that:

> "We therefore vacate the preliminary injunction as moot, and remand the case to the district court for a determination of appropriate attorney's fees."

In supplemental briefs prior to oral argument, at oral argument, and in post-submission memorandums, however, both parties agreed that the cause on appeal was not moot because a decision was needed on the substantive issues at bar in order that a proper determination could be made as to whether Jane Doe was a "prevailing party" for purposes of attorney's fees.

Both parties further agreed that without a determination of the validity of the trial court's decision, it would be illogical and unfair if one litigant could conclusively subject another to an assessment of fees as a result of a wrongly decided preliminary order. Petitioners would submit that it is for this reason that courts, which have awarded fees as a result of a grant of preliminary relief, have made these awards conditional and subject to return if a court's order is reversed on appeal. See *Howard v. Phelps*, 443 F.Supp. 374, 376 (E.D. La. 1978). See also *Smith v. University of North Carolina*, ____ F.2d ____ (4th Cir., Sept. 30, 1980).

REASON FOR GRANTING THE WRIT

From its inception, this case has raised serious jurisdictional issues under Section 504. One fundamental issue is whether the Congress, in enacting Section 504, intended to give private parties such as Jane Doe rights and remedies which they may seek to enforce privately in federal district court. If they have been given any rights and remedies, the question arises as to whether these rights are enforceable privately and to what extent they must be enforced solely or primarily by the Office of Civil Rights of the Department of Health and Human Services. Further, the court below did not decide whether the UIL constituted a "recipient" of federal financial assistance so as to trigger the regulatory provisions of Section 504 or whether, in fact, any discriminating treatment had been administered to John Doe in the UIL's consideration of his case. Certainly these issues should have been resolved before a proper determination could be made as to whether Jane Doe was a "prevailing party" for purposes of attorney's fees.

The court below's decision instead allows Jane Doe to recover attorney's fees solely because she received a preliminary injunction in the trial court which Petitioners argue was entered in error without even determination of the jurisdictional issues.

The question of whether such action should allow Jane Doe to be a "prevailing party" for attorney's fees, as held by the Court of Appeals, is of sufficient importance to merit resolution by this Court.

1. The Court of Appeals erroneously determined that the case was moot.

The Court of Appeals held that because Jane Doe had only sought injunctive relief for her son in the district court and her son had subsequently finished his final term in school, a justiciable case or controversy no

longer existed and a question of attorney's fees would not keep the case alive. Both the UIL and Jane Doe contended that the question of attorney's fees was an issue which could not be properly resolved until a determination on the merits was made by the court, which would, in turn, decide if Jane Doe was a "prevailing party" for purposes of 42 U.S.C. §1988.

On June 2, 1980, this Court entered a per curiam opinion, *Hanrahan v. Hampton*, 48 U.S.L.W. 3780, which addressed the "prevailing party" standard under 42 U.S.C. §1988. At issue was the plaintiffs' entitlement to attorney's fees for overturning several rulings by the district court at the appellate level, to wit: (1) the reversal of the district court's judgment directing verdicts against them; (2) the reversal of the district court's denial of a discovery motion; and (3) the direction to the district court to permit further discovery and hold a hearing on certain matters. This Court held that since plaintiffs had not prevailed on the merits of any of their claims, they were not entitled to attorney's fees. The basis of the opinion rested on the Court's interpretation of the legislative history of the Civil Rights Attorney's Fees Award Act of 1976:

> ...it seems clearly to have been the intent of Congress to permit...an interlocutory award only to a party who has established his entitlement to some relief on the merits of his claims, either in the trial court or on appeal. *Id.*, at 3781.

Under this standard, Jane Doe would not be entitled to attorney's fees. The Fourth Circuit recently issued a decision analogous to the present case. In *Smith v. University of North Carolina*, ____ F.2d ____ (4th Cir., Sept. 30, 1980), a claimant had succeeded in obtaining a preliminary injunction to prevent her discharge pending a decision on the merits, but the district court had ultimately found no merit in any of her discrimina-

tion claims. The court, citing *Hanrahan v. Hampton, supra*, ruled that the plaintiff was not a prevailing party for purposes of an attorney's fee award.

In *Grubbs v. Butz*, 548 F.2d 973 (D.C. Cir. 1976), *cited with approval* in *Hanarahan v. Hampton, supra*, at 3781, n.4, the court held that a plaintiff in a Title VII lawsuit who succeeded on one issue in an interlocutory appeal (concerning the necessity of exhaustion of administrative remedies) was not thereby eligible for an award of attorney's fees because she hadn't yet demonstrated discrimination. The court found that:

> For all we know, the Defendants in this case may be entirely blameless. If attorney's fees were assessed against them at this point in the litigation, the ultimately successful party might end up having subsidized a large segment of the losing party's suit against him. *Id.* at 976.

Hildebrand v. Board of Trustees of Michigan State University, 607 F.2d 705 (6th Cir. 1979, *per curiam*), found that while the plaintiff was correct that his civil rights suit should not have to pay for attorney's fees on the basis of a plaintiff's purely procedural victory. In *Nadeau v. Helgemoe*, 581 F.2d 275 (1st Cir. 1978), *cited with approval* in *Hanrahan v. Hampton, supra*, at 3781, n.4, the circuit court held that a party is "prevailing" for purposes of an attorney's fee award if he succeeds on any significant issue in litigation which achieves some benefit the parties sought in bringing suit. Since the plaintiffs in *Nadeau* prevailed on the issue of access to the prison library, they were entitled to attorney's fees.

In view of these holding, Jane Doe is not entitled to award of attorney's fees at this time. The only relief the district court granted was injunctive -- a procedural victory for Jane Doe at most. No finding has ever been made by the courts that John Doe, Jane Doe's son, was ever discriminated against by Petitioners, that

he was treated differently from any student falling under the provisions of the UIL's rules.

Furthermore, serious jurisdictional questions have still not been resolved by the courts below: whether Section 504 creates a private cause of action for private parties; whether the UIL is a recipient of federal funds which would trigger jurisdiction for the courts to decide the case; and whether 42 U.S.C. §1988 provides for an award of attorney's fees in a Section 504 case. Petitioners assert that were the courts to answer these questions, Petitioners would prevail in this lawsuit.[1] No significant issue raised by Jane Doe has been resolved in her favor. Therefore, at this time, an award of attorney's fees is improper under 42 U.S.C. §1983 and §1988. Clearly, the merits of this case must be decided before an award of attorney's fees can be made. Further, because attorney's fees will be contingent upon the determinations made on these issues, the court below was in error in its determination that the case is moot.

This critical question should be decided by this court to prevent Petitioners from being subjected to possible attorney's fees without ever having a determination made as to whether they are warranted.

2. If the case is moot, the proper cause of action would be for the Court of Appeals to set aside the decision below.

Furthermore, the general rule governing dismissal for mootness by an appellate court is to accompany such

[1]This Court has presently granted certiorari in the case of *The University of Texas, et al., v. Walter Camenisch*, No. 80-317, to determine whether a private cause of action was created by Section 504. Petitioners have also argued that a showing of bad faith or obstreperous conduct must be made to justify attorney's fees under 42 U.S.C. §1983; and require that 42 U.S.C. §1988 does not provide for an award of attorney's fees under a Section 504 case. Petitioners would respectfully direct the Court's attention to Petitioners' arguments and cases cited in this petition and brief.

order of dismissal with an order vacating the judgment below and to remand with directions to dismiss the case. *United States v. Munsingwear*, 304 U.S. 36 (1950); *Diffenderfer v. Central Baptist Church*, 404 U.S. 412 (1972); *Board of Regents of the University of Texas v. New Left Education Project*, 414 U.S. 807 (1974); reversing New Left Education Project v. Board of Regents, 472 F.2d 218 (5th Cir. 1973); *University of Texas Systems v. Assaf*, 435 U.S. 992 (1978), reversing *Assaf v. University of Texas System*, 399 F.Supp. 1245 (D.C. Tex.) *Duke Power Company v. Greenwood County*; 299 U.S. 259 (1936); *Troy State University v. Dicket*, 402 F.2d 515 (5th Cir. 1968); *Lebus v. Seafarer's International Union*, 398 F.2d 218 (5th Cir. 1968).

The application of the general rule, vacation of the judgment upon dismissal of an appeal for mootness, is not dependent upon the reason that the case had become moot. The rule applies whether a case becomes moot through happenstance or because of the actions of one of the parties. *Board of Regents v. New Left Education Project, supra; Diffenderfer v. Central Baptist Church, supra; Hall v. Beals*, 396 U.S. 45 (1969).

The logic and philosophy behind the rule requiring the vacation of the judgment of the lower court is to prevent legal consequences, either by precedental effect or res judicata, from arising from a judgment which was rendered unreviewable because of mootness. *United States v. Munsingwear, supra; Troy State University v. Dickey, supra, Lebus v. Seafarer's International Union, supra.*

The dangers in this case are even more apparent and immediate. Petitioners, without having the issue of the appropriateness of the judgment below determined, have been subjected to a possible judgment for attorney's fees in the amount of $11,373.75.

Moreover, other dangers to Petitioners are very real in this case. Without a final appellate determination as to whether the challenged UIL rule was actually unconstitutional, the UIL is faced with a court decision, which cannot be challenged and which in effect holds a UIL rule invalid. The only possible challenge would be to ignor the trial court decision, thus generating another suit wherein the UIL could again argue the merits of the UIL rule in question.

In such a case, a precedential effect of the decision of the lower court will obviously weigh against the UIL and the UIL will be handicapped in asserting a good faith defense to a prayer for damages.

The court below cited numerous cases in an apparent attempt to extinguish these fears. Petitioners submit, however, that these cases are distinguishable from the case at bar.

Plaintiffs in *Iranian Students Association v. Edwards*, 604 F.2d 352 (5th Cir. 1979), obtained a preliminary injunction *and* a consent decree against the rule which prohibited the activity of plaintiffs that precipitated the legal proceeding. In the case at bar, Jane Doe obtained a preliminary injunction, but there has been no adjudication either by consent or otherwise that the University Interscholastic League rule is invalid. The UIL rule is still in effect and is being enforced by UIL. Therefore, reliance upon *Iranian Students Association v.Edwards* as authority for awarding attorneys fees in this case is inappropriate. Likewise, in *Johnson v. State of Mississippi*, 606 F.2d 635 (5th Cir. 1979), the challenged statute was declared unconstitutional by the district court and during the pendency of the appeal, the Mississippi legislature amended the statute to eliminate the challenged provision. Here again, the plaintiff was successful in eliminating the challenged statutory provision. In the case at bar, this has not happened.

All of the "prevailing party" cases cited in the decision of the court below fall into the same category, i.e., the challenged rule or statute was changed so that the offending feature was removed. In that context, the plaintiffs were the "prevailing party." In the same context, Jane Doe in the case at bar is not the "prevailing party" because the UIL rule that was challenged is still intact and being enforced.

In the case now before the Court, Petitioners would argue that this Court should consider the court below's position as to mootness and should conform the law of the circuit to the decisions of this court in *University of Texas System, et al. v. Dr. Said A. Assaf, and Board of Regents v. New Left Education Project.*

CONCLUSION

The Petition for Writ of Certiorari should be granted for the reasons set out above.

Respectfully submitted,

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant

RICHARD E. GRAY, III
Executive Assistant

PAUL R. GAVIA
Chief, State & County Affairs

LAURA S. MARTIN
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3131

Attorneys for Petitioners

CERTIFICATE OF SERVICE

I, Laura S. Martin, Assistant Attorney General, do hereby certify that three copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was served upon Respondent by depositing same in the United States Mail, certified, return receipt requested to the following attorney of record for Appellee: Mr. Matthew Horowitz, The Clark Read Foundation, Inc., 1236 West Gray, Houston, Texas 77019, on this the _____ day of December, 1980.

LAURA S. MARTIN
Assistant Attorney General

APPENDIX

1. Opinion of the Court of Appeals

2. District Court Order (Reasons for Granting of Preliminary Injunction)

3. District Court Judgment (Injunction)

4. Fifth Circuit Judgment

5. Fifth Circuit Order Overruling Petition for Rehearing

JANE DOE, ON BEHALF OF JOHN DOE, A MINOR,
Plaintiff-Appellee,

V.

BAILEY MARSHALL, DIRECTOR OF THE UNIVERSITY INTERSCHOLASTIC LEAGUE, AND MEMBER OF THE EXECUTIVE COMMITTEE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, ET AL.,
Defendants-Appellants

No. 78-3065.

United States Court of Appeals,
Fifth Circuit.

July 21, 1980.

Action was brought on behalf of emotionally handicapped minor for injunctive relief which would allow minor to play interscholastic high school football at school to which he had transferred for medical reasons, despite interscholastic league's transfer regulations. The United States District Court for the Southern District of Texas, Finis E. Cowan, District Judge, granted a temporary injunction allowing minor to play football, and Defendant appealed. The Court of Appeals, Godbold, Circuit judge, held that: (1) the case was rendered moot by graduation of the minor, who had continued to play football throughout his senior year, and (2) even though the case was rendered moot, Plaintiff was entitled to an award of attorney fees.

Vacated and remanded.

1. FEDERAL COURTS 757

Action brought on behalf of emotionally handicapped minor for injunctive relief which would allow minor to play interscholastic high school football at school to which he transferred for medical reasons, despite

which he transferred for medical reasons, despite interscholastic league's transfer regulations, was moot where minor, who had continued to play football throughout his senior year in high school during pendency of the appeal, had graduated, and the case was not salvaged either by fact that Plaintiffs were required to post a $15 injunction bond or by their request for attorneys fees. Rehabilitation Act of 1973, §504, 29 U.S.C.A. §794.

2. CIVIL RIGHTS 13.17

A determination of mootness on appeal neither precludes nor is precluded by an award of attorney fees; question of attorney fees turns instead on wholly independent consideration of whether Plaintiff is a "prevailing party". 42 U.S.C.A. §1988.

3. FEDERAL CIVIL PROCEDURE 2737

Even preliminary relief may serve to make a Plaintiff a "prevailing party" such as would entitle him to award of attorney fees. 42 U.S.C.A. §1988.

4. FEDERAL CIVIL PROCEDURE 2737.5

Plaintiff, who obtained a temporary injunction allowing her emotionally handicapped minor son to play interscholastic high school football despite interscholastic league's transfer regulations was entitled to attorney fees even though the case was rendered moot during appeal by minor's graduation.

Appeal from the United States District Court for the Southern District of Texas.

Before GODBOLD, TJOFLAT and SAM D. JOHNSON, Circuit Judges.

GOLDBOLD, Circuit Judge:

Appellee brought this action for injunctive relief on behalf of her minor son, John Doe, alleging that Appellants had infringed his rights under §504 of the Rehabilitation Act of 1973, 23 U.S.C. §794.[1] The minor, who has remained anonymous throughout these proceedings, is an emotionally handicapped individual who transferred from one school district to another for medical reasons. Appellant University Interscholastic League (UIL) interpreted its own transfer regulations to preclude John from playing football at his new school. The district court found that all four factors necessary for preliminary relief were present,[2] and granted a temporary injunction allowing John to play football. The UIL appeals.

[1] During the pendency of this appeal, John has graduated from high school, having continued to play football throughout his senior year. This suit was not brought as a class action, and appellant sought only injunctive relief and not damages. There is, therefore, no longer a justiciable case or controversy and the case is moot.

[1]Section 504 creates a private right of action in addition to the administrative remedies it provides. *Camenisch v. University of Texas*, 616 F.2d 127 (5th Cir. 1980). We are thus not faced with a case in which no federal jurisdiction exists because the sole issue presented is interference with the right to play football. See *Mitchell v. Louisiana High School Athletic Association*, 430 F.2d 1155 (5th Cir. 1970). Instead, the refusal to allow John to play football infringes on statutorily-created federal right and thus the claim asserts a federal cause of action. See *Walsh v. Louisiana High School Athletic Association*, 616 F.2d 152, 156 (5th Cir. 1980).

[2]Those factors are:

1. Irreparable harm to the Plaintiff from failure to issue the injunction.
2. The relative lack of harm to the Defendant from issuance of the injunction.
3. The public interest.
4. Probability that the Plaintiff will ultimately succeed on the merits. *Camenisch v. University of Texas*, 616 F.2d 127, 130 (5th Cir. 1980).

Appellants contend that this case is "capable of repetition, yet evading review," and thus is within an established exception to the doctrine of mootness. *Roe v. Wade*, 410 U.S. 113, 125, 93 S.Ct. 705, 713, 35 L.Ed.2d 147, 161 (1973); *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 31 S.Ct. 279, 283, 55 L.Ed. 310, 316 (1911). This argument must fail in light of *DeFunis v. Odegaard*, 416 U.S. 312, 94 S.Ct. 1704, 40 L.Ed. 2d 164 (1974). In this case, as in DeFunis, the student has completed his final term in school, and "will never again be required to run the guantlet" of the UIL's transfer policies, *id.* at 319, 94 S.Ct. at 1707, 40 L.Ed.2d at 170. Moreover, as in DeFunis, there is no reason to suppose that future attacks on the UIL's rules will similarly evade review. *Id.* Finally, the case meets neither of the tests set out in *Walsh v. Louisiana High School Athletic Association*, 616 F.2d 152, 157 (5th Cir. 1980); the effect of the rule is not too short in duration to be fully litigated prior to its cessation or expiration, and there is no reasonable expectation that the Plaintiff will be subjected to the same difficulties again.

Appellants also contend that the fact that Appellees were required to post a $15.00 injunction bond keeps the controversy alive, citing *Camenisch v. University of Texas*, 616 F.2d 127 (5th Cir. 1980). Camenisch may be distinguished on two grounds. First, the bond in Camenisch could not be dissolved without an adjudication on the merits; the question presented in that case was which party ought to pay particular costs, and the bond constituted Plaintiff's guarantee of payment should the burden ultimately fall on him. In this case, Appellants have neither advanced monies nor suffered financial harm, so there will be no ultimate liability on the bond. Second, Camenisch involved a $3,000 bond; the $15 bond posted in this case must be considered de minimus by comparison.

Appellants' final argument is that appellee's request, under 42 U.S.C. §1988, for attorneys' fees salvages an

otherwise moot case.[3] This court has frequently refused to consider the merits of an otherwise moot case and has left the question of attorneys' fees for the district court on remand. See, e.g., *Johnson v. Mississippi*, 586 F.2d 387 (5th Cir. 1978); *McDonald v. Oliver*, 525 F.2d 1217 (5th Cir.), cert. denied, 429 U.S. 817, 97 S.Ct. 61, 50 L.Ed.2d 77 (1976).[4] Moreover, a determination of mootness does not prevent an award of attorneys' fees on remand. *Reiser v. Del Monte Properties Co.*, 605 F.2d 1135, 1140 (9th Cir. 1979); *Criterion Club of Albany v. Board of Commissioners*, 594 F.2d 118, 120 (5th Cir. 1979); *Ramey v. Cincinnati Enquirer, Inc.*, 508 F.2d 1188, 1196 (6th Cir. 1974), cert. denied, 422 U.S. 1048, 95 S.Ct. 2666, 45 L.Ed.2d 700 (1975).

[2-4] Thus a determination of mootness neither precludes nor is precluded by an award of attorneys' fees. The attorneys' fees question turns instead on a wholly independent consideration: whether Plaintiff is a "prevailing party." *Johnson v. Mississippi*, 606 F.2d 635 (5th Cir. 1979); *Iranian Students Association v. Edwards*, 604 F.2d 352 (5th Cir. 1979); *Morrow v. Dillard*, 580 F.2d 1284 (5th Cir. 1978). Even preliminary relief may serve to make a Plaintiff a

[3]Appellee also urges this contention, apparently fearful that a determination of mootness by this court would preclude any award of attorneys' fees. Our discussion of attorneys' fees rejects both arguments.

[4]In *Rainey v. Jackson State College*, 481 F.2d 347 (5th Cir. 1973), the court proceeded to the merits of a moot case in order to resolve a claim for attorneys' fees. *Rainey* is inapposite. In that case, the district court reached a final determination on the merits after a preliminary injunction had mooted the case. The case was thus already moot when it was tried in the district court. The Attorneys' Fees Act, 42 U.S.C. §1988, had not been enacted when Rainey was decided and the standard for awarding attorneys' fees was whether Defendant had been "unreasonable and obdurately obstinate". *Id.* at 350. This standard required examining the merits. As discussed below, §1988 requires only that Plaintiff be a "prevailing party".

"prevailing party" under the statute; the lawsuit need not proceed to completion. *Bly v. McLeod*, 605 F.2d 134 (4th Cir. 1979); *Iranian Students Association, supra; Criterion Club, supra; International Society for Krishna Consciousness, Inc. v. Andersen*, 569 F.2d 1027 (8th Cir. 1978); *Brown v. Culpepper*, 559 F.2d 274 (5th Cir. 1977). All that is required is that the Plaintiff obtain the primary relief sought. *Iranian Students Association, supra*, 604 F.2d at 353; *Adams v. Reed*, 567 F.2d 1283, 1288 (5th Cir. 1978). That requirement has been satisfied in this case.

We therefore vacate the preliminary injunction as moot, and remand the case to the district court for a determination of appropriate attorneys' fees.

VACATED and REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

JANE DOE, ON BEHALF OF JOHN DOE, a minor, Plaintiff	§	
V.	§	CIVIL ACTION NO. G-78-174
BAILEY MARSHALL, Director of the UNIVERSITY INTERSCHOLASTIC LEAGUE, ET AL., Defendants	§	

Matthew Horowitz, Houston, Texas
For Plaintiff

Robert W. Gauss, Assistant Attorney General,
Austin, Texas
For Defendant UIL

REASONS FOR GRANTING OF PRELIMINARY INJUNCTION

For the reasons stated herein, the Court has concluded that the Plaintiff is entitled to a preliminary injunction restraining the Defendants from barring Plaintiff from interscholastic competition and restraining the Defendant McKenzie from denying to the Plaintiff the right to participate in interscholastic athletics, particularly football, during the school year 1978-79. The reasons for the granting of this relief are set forth herein.

Essential Facts

The parties have appeared, introduced evidence, and on the basis of this evidence the Court finds that the facts set forth in the Plaintiff's Original Complaint, a copy of which is appended hereto as Exhibit A, are essentially

correct, at least for purposes of determining the Plaintiff's right to a preliminary injunction.

The essential facts are:

1. John Doe is a "handicapped" individual within the meaning of 29 U.S.C. §794.

2. John Doe, because of an unusual set of circumstances, has a legitimate, compelling necessity for living with his grandparents rather than his parents.

3. John Doe, because of his severe psychiatric difficulties, has a genuine, compelling need to participate in interscholastic football, and denying him this right, under the circumstances, would create irreparable harm. Participation in athletics during his senior year could mean the difference between John Doe's growing up as a normal, productive adult, as distinguished from the possibility of his being institutionalized for the rest of his life.

Plaintiff has exhausted her apparent administrative remedies with the Alvin Independent School District (hereinafter AISD) and with the University Interscholastic League (Hereinafter UIL), seeking relief from AISD, from the UIL, and from the District Executive Committee of the UIL which preliminarily determines eligibility.

Plaintiff seeks relief under 42 U.S.C. §1983 and 29 U.S.C. §794. 42 U.S.C. §1983 reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and

> laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

29 U.S.C. §794 reads:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

A review of the legislative history and the cases which illuminate §794 reveal that this congressional enactment, for practical purposes, places upon school districts and agencies which receive federal funds, such as the Defendants, the duty of analyzing individually the needs of each handicapped student and devising a program which will enable each individual handicapped student to receive an appropriate, free public education. The failure to perform this analysis and structure a program suited to the needs of each handicapped child, constitutes discrimination against that child and a failure to provide an appropriate, free public education for the handicapped child. *Lau v. Nichols*, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d (1973); *Crawford v. University of North Carolina*, 440 F.Supp. 1047 (ND NC 1977); *Hairston v. Drosick*, 423 F.Supp. 180 (SC W.Va. 1976); *Camenisch v. University of Texas*, ____ F.Supp. ____ (WD Tx 1978); *Fialkowski v. Shapp*, 405 F.Supp. 946 (ED Pa 1975).

In this particular case, AISD is willing to perform its legal duty. AISD has, however, in effect, delegated to the UIL the right to determine which students will participate in interscholastic athletics.

The challenged rule of the UIL would, as construed by UIL, prohibit John Doe's playing football for AISD.

There is apparently no structure within the organizational scheme of the UIL which provides a mechanism by which special and individual cases, such as John Doe's, may be given special and individual handling.

A review of the facts and the authorities set forth above has persuaded this Court that there is a reasonable probability that the Plaintiff will prevail on the merits.

The Court, in determining whether or not to grant a preliminary injunction, must also balance the harm which will be inflicted upon the Plaintiff, if relief is not granted, against the harm which will be visited upon the Defendants in the event relief is granted. In this case, as in the recent case of *Kite v. University Interscholastic League*, ____ F.Supp. ____ (SD Tx 1978), the balancing task is easy. The harm which would be inflicted upon this young man were he denied the opportunity to play football in his senior year at Alvin may be enormous. Playing football in his senior year may make the difference between this young man's growing up into a productive, happy individual, or, on the contrary, being institutionalized for the balance of his life. Denying this young man and his parents the right to the individualized treatment which 29 U.S.C. §794 mandates, is a severe deprivation.

No harm is visited on the UIL, in this Court's view, by the preliminary injunction. The UIL rule in question was designed to prevent recruiting abuses and to prevent an athelete from irresponsibly "shopping around" for a school or a coach. There is no suggestion or hint in the evidence that either of these evils is in any degree involved here, and the Plaintiff has proved persuasively that there are compelling medical and psychiatric reasons why this young man needs to go to school in Alvin, and needs to play football on the Alvin team.

The Court needs to balance the questions involved here in the light of the public interest. This Court believes that 29 U.S.C. §794 is a humane, and reasoned statute and that the public interest is served by its enforcement. In any event, regardless of this Court's views concerning 29 U.S.C. §794, it is the law as enacted by the Congress of the United States, and it is this Court's duty under 42 U.S.C. §1983 to enforce it.

Defendants contend that 29 U.S.C. §794 does not provide a private right of action. The law is to the contrary. See *Lau v. Nichols, supra; Cort v. Ash*, 442 U.S. 66, 45 L.Ed.2d 26 (1975); *Lloyd v. Regional Transportation*, 548 F.2d 1277 (7th Cir. 1977); *United Handicapped Federation v. Andre*, 558 F.2d 413 (8th Cir. 1977); *Kampmeier v. Nyquist*, 553 F.2d 296 (2nd Cir. 1977).

For the reasons set forth above, this Court has determined to grant a preliminary injunction enjoining the Defendants from taking any action to prevent John Doe from playing football for Alvin Independent School District, during the football season commencing in August of 1978. This case is not a class action. The relief granted is granted only to John Doe and his parents, and is granted only pending the trial of this case on the merits.

DONE this the 16th day of August, 1978.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

JANE DOE, ON BEHALF OF JOHN DOE, A MINOR, Plaintiff	§	
V.	§	Class Action No. G-78-174
BAILEY MARSHALL, Director of the UNIVERSITY SCHOLASTIC LEAGUE, et al., Defendants	§	

INJUNCTION

For the reasons stated in that document of even date herewith entitled "Reasons for Granting of Preliminary Injunction," the court hereby GRANTS a preliminary injunction, and pending trial of this case on the merits, enjoins the Defendants from interfering with, or preventing the minor Plaintiff, JOHN DOE, from full participation in the football program at Alvin Independent School District during the school year commencing in August 1978; and enjoining the Defendants from taking any action which would prohibit, impede or interfere with the rights of Alvin Independent School District to participate fully in the activities of the University Interscholastic League because of John Doe's participation on the Alvin Independent School District team. Plaintiff shall post a bond in the amount of Fifteen Dollars ($15.00).

The papers in this case which were previously sealed are now ordered unsealed since this matter has now been heard fully in open court.

DONE this the 16th day of August, 1978.

UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 19

No. 78-3065

D.C. Docket No. CA-G-78-174

JANE DOE, on behalf of John Doe, a minor,
Plaintiff-Appellee,

versus

BAILEY MARHSALL, Director of the University Interscholastic League, and Member of the Executive Committee, Individually and in his Official Capacity, ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Texas

Before GODBOLD, TJOFLAT and SAM D. JOHNSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the order of the District Court appealed from, in this cause be, and the same is hereby, vacated, and that this cause be, and the same is hereby remanded to the said District Court for a determination of appropriate attorneys' fees in accordance with the opinion of this Court;

It is further ordered that each party pay its own costs on appeal.

July 21, 1980

Issued as Mandate: 10-8-80

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OFFICE OF THE CLERK

September 24, 1980

TO ALL PARTIES LISTED BELOW:

NO. 78-3065 - JANE DOE, etc., vs. BAILEY MARSHALL, etc., ET AL.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appeliate Procedure; Local Fifth Circuit Rule 10) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

GILBERT F.
GANUCHEAU, Clerk

By /s/

Deputy Clerk

cc: Mr. Douglas B. Owen
Ms. Laura S. Martin
Mr. Matthew Horowitz